

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ALLEN BRIAN-RICHARD SMALL,

Plaintiff-Appellant,

v

CHRISTOPHER CHIRCO,

Defendant-Appellee.

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UNPUBLISHED

January 14, 2014

No. 311728

Kent Circuit Court

LC No. 11-007290-NO

Before: MARKEY, P.J., and BECKERING and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting summary disposition in favor of defendant. We affirm.

In the early morning hours of September 25, 2010, defendant, a Kent County deputy sheriff assigned to road-patrol duties, observed plaintiff suddenly pull his vehicle over to the side of the road. Defendant made a citizen contact with plaintiff. He noted that plaintiff smelled of alcohol and his eyes were bloodshot. Plaintiff refused to perform field sobriety tests and to submit to a preliminary breath test. Defendant arrested plaintiff for operating a motor vehicle while under the influence of alcohol in violation of MCL 257.625(1). At the jail, defendant executed an affidavit and requested a search warrant to obtain a sample of plaintiff's blood. Plaintiff's blood was drawn pursuant to the search warrant, and it revealed that plaintiff's blood alcohol content was .06 grams of alcohol per 100 milliliters of blood.<sup>1</sup> Plaintiff was subsequently charged with operating a motor vehicle while under the influence of alcohol, but the charge was later dismissed.

Plaintiff filed a complaint, alleging two federal claims against defendant pursuant to 42 USC § 1983, specifically an unreasonable seizure (unlawful arrest) and malicious prosecution in violation of his Fourth Amendment rights. Plaintiff also alleged two state claims of unlawful arrest and malicious prosecution. Defendant moved for summary disposition, arguing that

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<sup>1</sup> The offense of operating while intoxicated includes a person operating a motor vehicle when "[t]he person has an alcohol content of 0.08 grams or more per 100 milliliters of blood." MCL 257.625(1)(b).

plaintiff could not establish a lack of probable cause. The trial court agreed and granted defendant's motion for summary disposition on all of plaintiff's claims.

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Although the trial court did not identify the subrule under which it granted summary disposition, it is apparent that the motion was granted under MCR 2.116(C)(10) because the trial court's consideration went beyond the parties' pleadings. *Healing Place v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007). In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), this Court considers affidavits, pleadings, depositions, admissions, and other evidence filed in the action or submitted by the parties, in a light most favorable to the party opposing the motion. *Maiden*, 461 Mich at 120. Summary disposition is proper where the evidence fails to establish a genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Whether probable cause exists is a question of law that is reviewed de novo. *Matthews v Blue Cross and Blue Shield*, 456 Mich 365, 377; 572 NW2d 603 (1998).

An arrest without probable cause is an unreasonable seizure that violates the Fourth Amendment. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 23; 672 NW2d 351 (2003). To establish an unlawful arrest claim under federal law, the plaintiff must establish that the arrest was made without a warrant and without probable cause to believe that the plaintiff had committed or was committing a crime. *Everson v Leis*, 556 F3d 484, 498 (CA 6, 2009). In Michigan, to establish liability for a false arrest, the plaintiff has the burden of proving that the arrest was not legal, i.e., that it was made without probable cause. *Peterson*, 259 Mich App at 18; *Walsh v Taylor*, 263 Mich App 618, 626; 689 NW2d 506 (2004). Whether the plaintiff could have actually been convicted of the offense is irrelevant. *Peterson*, 259 Mich App at 18.

Probable cause is defined as facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person or one of reasonable caution to believe that the suspect has committed a criminal offense. *Matthews*, 456 Mich at 387; *Sykes v Anderson*, 625 F3d 294, 306 (CA 6, 2010). In Michigan, it is a crime for a person who is intoxicated because of the consumption of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance to "operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles." MCL 257.625(1).<sup>2</sup>

We find that sufficient undisputed facts exist to establish that defendant arrested plaintiff on probable cause to believe defendant was operating a motor vehicle while under the influence of alcohol. The record establishes that sometime between 1:30 a.m. and 2:00 a.m. plaintiff and defendant passed one another on the roadway. Plaintiff flashed his headlights twice as he approached defendant and the vehicle in front of him, apparently because the other vehicle's headlights were on "bright." Defendant turned his police cruiser around to follow plaintiff. Moments later, plaintiff abruptly pulled over onto the side of the road. When defendant made

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<sup>2</sup> MCL 257.625(3) prohibits the lesser offense of operating a vehicle while "visibly impaired."

contact with plaintiff, plaintiff told defendant that he had been “downtown” with a friend earlier that evening. Defendant noticed that plaintiff’s eyes were bloodshot and he smelled of alcohol. When defendant asked, plaintiff denied that he had been drinking that evening. But at a deposition, plaintiff admitted that he had consumed a small amount of wine and “somewhere in the range” of two draft beers that evening. Plaintiff further acknowledged that it was “possible” that he smelled of alcohol. Defendant arrested plaintiff after he refused to submit to field sobriety tests and a preliminary breath test.

Because the undisputed facts set forth above and circumstances within defendant’s knowledge at the time of plaintiff’s arrest were sufficient for a prudent person to believe that plaintiff was operating a motor vehicle while under the influence of alcohol, we find that a reasonable juror could not conclude that defendant lacked probable cause to arrest plaintiff. *West*, 469 Mich at 183; *Matthews*, 456 Mich at 387; *Sykes*, 625 F3d at 306. Accordingly, we find that the trial court properly granted summary disposition on plaintiff’s state and federal unlawful arrest claims.

Plaintiff next argues that the trial court erred by granting summary disposition as to his federal and state malicious prosecution claims. To prevail on a federal claim of malicious prosecution, the plaintiff must establish that (1) the defendant made, influenced, or participated in the decision to prosecute the plaintiff; (2) without probable cause to believe the criminal proceeding could succeed; (3) as a consequence of the legal proceeding, the plaintiff suffered a deprivation of liberty, apart from the initial seizure; and (4) the matter terminated in plaintiff’s favor. *Sykes*, 625 F3d at 308-309. A plaintiff has a viable claim for malicious prosecution against a police officer if the plaintiff establishes that (1) the officer stated a deliberate falsehood either knowingly or in reckless disregard for the truth, and (2) the allegedly false or omitted information was material to the prosecution determining that there was probable cause to initiate criminal proceedings against the plaintiff. *Id.* at 312.

Similarly, to establish a malicious prosecution action under Michigan law, the plaintiff has the burden of proving that: (1) the defendant initiated a criminal prosecution against him; (2) the criminal proceeding terminated in the plaintiff’s favor; (3) the private person who instituted or maintained the prosecution lacked probable cause for his actions, and (4) the action was undertaken with malice or for a purpose other than bringing the offender to justice. *Matthews*, 456 Mich at 378. To establish a claim of malicious prosecution against a police officer in Michigan, the plaintiff must establish that (1) the officer knowingly and deliberately swore to false facts in a complaint, and (2) the officer’s statements were material or necessary to the finding of probable cause. *Payton v Detroit*, 211 Mich App 375, 395; 536 NW2d 233 (1995).

Plaintiff argues that defendant purposely included false information in the search warrant affidavit in order to establish probable cause, and, as a result of defendant’s misrepresentation, the prosecutor found probable cause to charge plaintiff with operating a motor vehicle while under the influence of alcohol. Assuming without deciding that the prosecutor relied on the search warrant affidavit when deciding if there was probable cause to initiate criminal proceedings against plaintiff, we find that there are sufficient undisputed facts contained in the affidavit to establish probable cause. The undisputed facts establish that defendant made contact with plaintiff after 2:00 a.m. and after plaintiff flashed his headlights several times and suddenly pulled over to the side of the road and stopped. Defendant averred that plaintiff smelled of

alcohol, had bloodshot eyes, and refused to take field sobriety tests or submit to a preliminary breath test.<sup>3</sup> We conclude reasonable minds could not differ as to whether these undisputed facts set forth in the affidavit and taken together and in their totality established probable cause that plaintiff was operating a motor vehicle while under the influence of alcohol. Accordingly, because there is no material question of fact as to whether defendant's alleged misrepresentations were necessary for the prosecutor to find probable cause to commence criminal proceedings against plaintiff, we find that the trial court properly granted summary disposition on plaintiff's state and federal claims of malicious prosecution. *West*, 469 Mich at 183; *Matthews*, 456 Mich at 387; *Sykes*, 625 F3d at 306.

Because we have determined that the trial court properly granted summary disposition in favor of defendant, we need not consider defendant's alternate argument related to immunity or plaintiff's argument regarding remand to a different trial judge.

We affirm.

/s/ Jane E. Markey  
/s/ Jane M. Beckering  
/s/ Cynthia Diane Stephens

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<sup>3</sup> We note that we are not concluding that refusing to take field sobriety or a preliminary breath test in and of themselves may constitute probable cause.